STATE OF MICHIGAN

COURT OF APPEALS

EDWARD S. HARTKE and MARGARET W. HARTKE, Co-Independent Personal Representatives of the Estate of ANDREW WILLIAM HARTKE, Deceased,

Plaintiffs-Appellees,

v

OAKLAND COUNTY, OAKLAND COUNTY SHERIFF, and GREGORY GLOVER,

Defendants-Appellants,

and

JOSEPH CARL WEEDER, DAWNA SUE GARRIS, SUK JA KIM, d/b/a KIM'S CONVENIENCE STORE, and PHILLIP RACE,

Defendants.

UNPUBLISHED
October 23, 2003

No. 240097
Oakland Circuit Court
LC No. 1999-019521-NO

BRIAN BENNINGER and THERESA BENNINGER, Co-Independent Personal Representatives of the Estate of GREGORY D. BENNINGER, Deceased,

Plaintiffs-Appellees,

v

OAKLAND COUNTY, OAKLAND COUNTY SHERIFF, and GREGORY GLOVER,

Defendants-Appellants,

and

JOSEPH CARL WEEDER, DAWNA SUE

No. 241068
Oakland Circuit Court
LC No. 1999-019520-NO

GARRIS, SUK JA KIM, d/b/a KIM'S
CONVENIENCE STORE, and PHILLIP RACE,

Defendants.

Before: Whitbeck, C.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendants Oakland County, the Oakland County Sheriff, and Oakland County Sheriff's Deputy Gregory Glover (collectively "defendants") appeal by leave granted from an order denying their motion for summary disposition. We reverse and remand.

Plaintiffs' decedents died from injuries they received when their vehicle was struck by a vehicle driven by Joseph Weeder, who was legally intoxicated. At the time of the accident, Weeder was fleeing from Deputy Glover, who was in pursuit in his patrol vehicle. Plaintiffs filed separate wrongful death actions against Oakland County, the Oakland County Sheriff, Deputy Glover, and other defendants, alleging, inter alia, theories of negligence and gross negligence in connection with Deputy Glover's operation of his patrol vehicle. The governmental defendants moved for summary disposition, relying on *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000). The trial court denied the motion, concluding that *Robinson, supra*, which was decided after the accident in question, does not apply retroactively.

On appeal, defendants argue that the Supreme Court's decision in *Robinson, supra*, should be applied retroactively, so as to bar plaintiffs' actions against them. We agree.

Under MCL 691.1405, government agencies and municipalities are liable for injuries "resulting from the negligent operation . . . of a motor vehicle[.]" Additionally, pursuant to MCL 691.1407(2)(c), government employees are personally liable for "gross negligence that is the proximate cause of [an] injury[.]"

In *Robinson, supra*, our Supreme Court held that, in the context of a police pursuit, a police officer's initial "decision to pursue does not constitute the negligent operation of a motor vehicle." *Robinson, supra* at 445, 457-458. Additionally, the Court stated that, for an individual officer to be liable, the officer's actions must have been "the proximate cause" of the plaintiff's injuries, which "means the most immediate, efficient, and direct cause," not merely "a proximate cause." *Id.* at 445-446, 458-459, 469. Accordingly, the Court concluded that a plaintiff's injuries do not, as a matter of law, result from the operation of a police car where the police car "did not hit the fleeing car or physically cause another vehicle or object to hit the vehicle that was being chased or physically force the vehicle off the road or into another vehicle or object." *Id.* at 445. In this case, it is undisputed that Deputy Glover's patrol vehicle never physically struck Weeder's car before that car struck plaintiffs' decedents' vehicle, nor did Deputy Glover's patrol car make contact with plaintiffs' decedents' vehicle. Plaintiffs do contend that Deputy Glover's actions were tantamount to forcing Weeder's car off the road or into another vehicle.

The significant issue in this case is whether the Supreme Court's decision in *Robinson, supra*, applies retroactively, or only prospectively. Whether a judicial decision should be limited

to prospective application is a question of law that we review de novo. *Adams v Dep't of Transportation*, 253 Mich App 431, 434-435; 655 NW2d 625 (2002). Generally, judicial decisions are given full retroactive effect. *Id.* at 435.

In *Ewing v Detroit*, 252 Mich App 149, 151-152; 651 NW2d 780 (2002), the majority declined to apply *Robinson* retroactively to an accident that occurred in 1990, when a vehicle fleeing from the police struck the plaintiff's car and seriously injured her daughter. Because the case had been the subject of prior appeals in which this Court had decided various issues in accordance with pre-*Robinson* caselaw, the majority held that, under the law of the case doctrine, *Robinson* did not apply. *Ewing*, *supra* at 160-167. In a dissenting opinion, however, Judge Kelly opined that *Robinson* constituted an intervening change in the law and, therefore, the law of the case doctrine did not apply. *Id*. at 175-178. Additionally, Judge Kelly concluded that *Robinson* did not overrule "*clear and uncontradicted* caselaw" and, therefore, exclusively prospective application was not justified. *Id.* at 178-181 (emphasis added). Judge Kelly stated that, "[a]bsent a clear directive from our Supreme Court indicating that *Robinson* should be applied [only] prospectively, [this Court is] constrained to follow the general rule providing for full retroactive application." *Id.* at 181-182.

On appeal, the Supreme Court summarily reversed this Court's majority decision in *Ewing*, stating that, "[f]or the reasons stated in the dissenting opinion in the Court of Appeals, *Robinson* . . . applies retroactively." *Ewing v Detroit*, 468 Mich 886; 661 NW2d 235 (2003). The following day, the Supreme Court summarily affirmed this Court's decision in another case,[1] but added:

> The Court of Appeals erred, however, in stating that *Robinson* . . . is limited to prospective application. See our order in *Ewing v City of Detroit*, 468 Mich ___ (2003), in which the Supreme Court clarified that *Robinson* applies retroactively. [*Sinishtaj v Detroit*, 468 Mich 886; 661 NW2d 235 (2003).]

See also *Curtis v Flint*, 253 Mich App 555, 563-567; 655 NW2d 791 (2002), wherein this Court, agreeing with Judge Kelly's dissenting opinion in *Ewing*, concluded that the trial court did not err in applying *Robinson* retroactively.

In light of the above decisions, we conclude that the trial court erred in refusing to apply *Robinson, supra*, retroactively to the present case.

Plaintiffs, nonetheless, argue that, even if *Robinson* is applied retroactively, defendants' motion for summary disposition should still be denied.[2] In this regard, plaintiffs do not assert that Deputy Glover's patrol vehicle physically struck either plaintiffs' decedents' car or

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[1] *Sinishtaj v Detroit*, unpublished opinion per curiam of the Court of Appeals, issued July 9, 2002 (Docket No. 230539).

[2] A trial court's grant of summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Guerra v Garrat*, 222 Mich App 285, 288; 564 NW2d 121 (1997).

Weeder's car, or physically caused another vehicle or object to hit Weeder's car, or that Deputy Glover's patrol car physically forced Weeder's car into plaintiffs' decedents' car. Rather, plaintiffs assert that Deputy Glover was pursuing Weeder's car so closely that he essentially forced Weeder to run into plaintiffs' decedents' vehicle, because Weeder was "distracted" by Deputy Glover's "actions." We conclude that these allegations, accepted as true, are insufficient to avoid summary disposition.

In *Price v Hiller*, unpublished opinion per curiam of the Court of Appeals, issued February 7, 2003 (Docket Nos. 234315; 234347), slip op at pp 2-3,[3] the majority concluded that there was a factual dispute concerning "whether the police vehicle hit the fleeing pickup or physically forced it off the road and whether, if the pickup was forced off the road, the driver could have regained control in time to avoid the collision." Therefore, the majority held that the trial court erred in granting summary disposition to the defendants on the basis of *Robinson, supra*.[4] *Price*, *supra*, slip op at 2-3. In a dissenting opinion, Judge O'Connell concluded that there was no question of material fact concerning causation because, even if the patrol car rammed the fleeing vehicle and forced it off the freeway, the evidence was undisputed that the fleeing vehicle continued to travel for "approximately 1-1/2 football fields [across the median and the oncoming lanes of traffic] before making a near 90-degree turn onto an exit ramp," where the vehicle struck the plaintiff's vehicle. *Price*, *supra*, slip op at 3-4. On appeal, the Supreme Court reversed this Court's majority decision in *Price* "for the reasons stated in . . . [Judge O'Connell's] dissenting opinion." *Price v Hiller*, 469 Mich 853; 666 NW2d 666 (Docket No. 123368, decided July 17, 2003).

In the present case, plaintiffs assert that Deputy Glover may have been "very, very close" to Weeder's car and that Weeder may have hit plaintiffs' decedents' vehicle because he was "distracted" by Deputy Glover's "actions." But there was no evidence or allegation that Weeder's car was physically forced into plaintiffs' decedents' vehicle or off of the road. Because there is no evidence that Weeder was unable to stop due to physical contact with Deputy Glover's patrol vehicle before colliding with plaintiffs' decedents' vehicle or that Deputy Glover's vehicle physically forced Weeder's vehicle into physical contact,[5] we conclude that plaintiffs have failed to show a genuine issue of material fact concerning whether Deputy Glover physically forced Weeder into plaintiffs' decedents' car. See *Robinson*, *supra* at 445; see also *Curtis*, *supra* at 561-562 (where a driver abruptly moved aside to allow paramedics through, and was then hit by the plaintiff, the plaintiff's injuries did not result from the defendant's operation of the emergency vehicle). Therefore, summary disposition in favor of defendants is warranted.

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[3] We view this opinion as persuasive, because of the limited case law, but note that unpublished opinions are not binding under the rules of stare decisis. MCR 7.215(C)(1).

[4] The parties apparently did not raise the issue of whether *Robinson* should be applied retroactively.

[5] Even accepting plaintiffs' argument as true, that Deputy Glover was within thirty to fifty yards of Weeder's vehicle, no question of fact has been raised with regard to whether Weeder's vehicle was physically forced off the road or into another vehicle by Deputy Glover.

Although plaintiffs also argue that *Robinson, supra,* was incorrectly decided, we are bound to follow our Supreme Court's decisions. See *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993).

Reversed and remanded for entry of summary disposition in favor of defendants. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Jane E. Markey